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ABSTRACT

To help school officials avoid litigation, this newsletter examines two separate issues: student competency testing and educational choice. The authors propose objective certification--in which student achievement is described solely by objective, defensible scores--as a way to avoid the possible injury to students inherent in competency testing. Court litigation involving educational choice, as discussed in the newsletter, reveals a number of legal pitfalls, especially where programs to expand choice may result in racial imbalance. Among the problems mentioned are additional fees for extracurricular activities and educational materials, due process in the withdrawal of choice programs, and aid to private schools. The authors recommend several actions for school districts to take to avoid litigation when implementing choice programs. (RW)

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Objective certification, as described in this footnote, may provide a preferable alternative to competency testing programs in some situations. Objective certification merits consideration as an alternative to competency testing since it reduces the likelihood of litigation and judicial intervention by minimizing potential injury to students.

The trigger for legal scrutiny of a competency testing program is *injury*. If there is no injury, there are no legal problems. Injury occurs in all competency testing programs where some students are denied a high school diploma on the basis of that test. The potential legal claim is stronger where many rather than just a few students fail the test, stronger still where disproportionate numbers of

black, Hispanic or other minority students do not receive diplomas, and especially strong where there has been a prior finding of racial or linguistic discrimination against minority students by their districts.

Most diploma-based competency programs maximize injury to some students by effectively labeling them "incompetent," "inproficient," or "functionally illiterate" with their versions of "competency," "proficiency" or "functional literacy" tests. Denial of a diploma as a result of failing a competency test is in effect state certification of incompetence. It is difficult to conceive of a more injurious label that a state or school district can place on a student during or after 12 years of

schooling than incompetent, inproficient, or functionally illiterate (or comparable semantic variations). The injury would be considerable even where the label is accurate, and the injury is aggravated since the state of the psychometric art is such that practitioners cannot validly claim this kind of accuracy. The more injurious the label, the more careful and accurate the labeling process should be to avoid unfairness and illegality.

One obvious approach to competency testing that eliminates potential injury is to forgo a diploma or promotion sanction and use the test only for diagnostic and education purposes (although injury could still occur if the testing program had the purpose or effect of tracking or resegregation). For legislators and other policy makers who also want competency testing to serve a certification purpose, another approach is to mitigate potential injury and legal liability by minimizing the injurious labeling that is inherent in the certification established by most diploma-based competency testing programs. This approach can be called "objective certification."

Objective certification minimizes potential injury and litigation by limiting certification of a student's achievement to objectively defensible statements. At its most basic level, a state or school district can safely and accurately certify that *a student scored X on Y test on Z date*. Then the primary question is whether these three claims (X score, Y test, Z date) are accurate, and this is easily and objectively verifiable. The difficulties of course arise when the state or district draws (or implies or encourages) the conclusion that the student is *incompetent* (or *inproficient*, etc.) as a result of scoring X on Y test on Z date. It is this great leap from objective fact to subjective conclusion that causes most of the injury in diploma-based competency testing programs. Objective certification would limit state or district certification to objective, defensible fact, and let others draw the conclusion as to the facts' ultimate meaning.

In concrete terms, this alternative approach might take the form of giving all students standard diplomas if they meet the usual Carnegie and other course requirements. With objective certification, that standard diploma could also certify that the student scored X on Y test on Z date. For example, "This is to certify that Jane Doe scored 65 on the State Achievement Examination on May 1, 1981." This approach would thus recognize that all students have achieved to a certain degree and would also recognize gradations based on individual achievement. The problems inherent in setting cut-off scores and drawing global conclusions about competence would disappear as irrelevant.

Objective certification would become less objective and defensible to the extent that the wording and implications of the certification statement changed. For example, objective certification is neutral in stating that "Jane Doe scored X." If the statement were that "Jane Doe *failed* or *passed* Y test with a score of X," the certification is less defensible given the recognized difficulties of setting objective cut-off scores. Similarly, if the statement were that "Jane Doe *failed* the State Competency Test," the cut-off score problem is aggravated by the implication that failure means the student is not competent. Each change in wording has different implications and therefore different potential for injury and liability.

As stated above, objective certification would limit state certification to objective, defensible fact, and let others draw the conclusion as to that fact's ultimate meaning. If the certification were neutral, employers and postsecondary education institutions could draw their own conclusion, if any, as to how well a student with X score is likely to do in their setting. In fact, this conclusion, if any, will probably vary according to the exact occupational or educational setting. A score of 50 might be interpreted on the basis of past experience as sufficient by some employers and insufficient by others. To the extent that indefensible conclusions are drawn, the main legal responsibility will fall on the employer or other user who draws such conclusions rather than on the state or school district.

Objective certification as described above is not legally invulnerable. For example, just as liability might be found if the state or district awarded blue and red diplomas and the community perceived one color to mean "failing" and/or "incompetent," a state or school district might be held legally responsible for impermissible inferences if the community *perceived* a certain score to mean "failing" and/or "incompetent," especially if the state or district had encouraged that perception by implicit or explicit actions. This might be the case, for example, where a state or district has a competency testing program in place and then subsequently moves to an objective certification program. In this case it may be difficult to avoid the inference that "objective certification" is simply another name for "competency test."

Some student advocates would also argue on behalf of those minority and other students denied equal education opportunity that even objective certification of the kind described above is unfair and illegal because it effectively certifies, emphasizes and legitimizes student scores that reflect poor performance attributable as much to the system as to the student. The legal argument, a variation of

that successfully argued in *Debra P. v. Turlington*, (474 F.Supp. 244, M.D. Fla. 1979) (summarized in *Footnotes*, November 1979), is that such certification by the state or school district simply carries forward the effects of past discrimination. Lawyers may differ as to the strength of this claim, in general or as applied to specific factual situations. For purposes of this footnote, it is sufficient to say that a carefully designed and implemented program of objective certification would be fairer and less injurious to students, and therefore much more defensible in the face of potential litigation. As such, it merits consideration as an alternative to diploma-based competency testing programs.

Objective certification as described above has some advantages over the subjective labeling inherent in most diploma-based competency testing programs. There are some trade-offs necessary to achieve the advantages. For example, this approach may not produce the "leverage" on students, teachers and school systems that is often intended by policy makers. It may not give employers, educators and the community at large the clear signal they may desire regarding minimum competence. But when the leverage and that signal are based on questionable conclusions and substantial injury, perhaps the various trade-offs merit reconsideration. —MSM

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U.S. District Court Judge John Grady recently held that use of IQ tests by the Chicago public schools to place children in classes for educable mentally handicapped is not racially discriminatory. In a similar case summarized in the February and June 1980 issues of *Footnotes*, U.S. District Judge Robert Peckham held in *Larry P. v. Riles* that California school officials unlawfully discriminated against black children by using racially and culturally biased IQ tests to classify and place them in classes for the educable mentally retarded. Judge Grady's opinion in *Parents in Action on Special Education v. Hannon*, No. 74 C 3586 (N.D. Ill., decision July 1980), will be summarized in the next issue of *Footnotes*.

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The last issue of *Footnotes*, June 1980, included a discussion of potential legal pitfalls of various methods for providing a range of educational choices to families. Footnotes 38 through 42, below, continue this discussion.

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Racial imbalance resulting from the denial of choice can present the same legal difficulties as were presented by the use of choice plans in positive ways. As is the case with family choice plans that may produce racial imbalance, restricting choice in a way that produces a racially disproportionate impact is likely to raise questions.

For example, some school districts have adopted certain prerequisites to admission to a particular course or program with the result that some children are excluded. One such prerequisite is often the payment of a fee for materials or, more rarely, an instruction fee for a specialized course or a course not considered part of the basic curriculum. This practice, discussed in greater detail in Footnote 39, often has the direct effect of excluding children too poor to pay the fees. Many of these lower-income children will also be minority children. Another way of excluding some children from a part of the program is through certain qualifying tests or other measures of academic achievement. As minority children are more often from impoverished families unable to provide the child with the same kind of experiential enrichment provided a child of more wealthy parents, they are likely to be disproportionately excluded. Cultural bias in testing may also contribute to exclude minority children.

Choice can also be effectively denied in a racially biased manner through counseling. For example there is some evidence suggesting that teachers and counselors sometimes steer minority children into vocational education, while advising majority children to pursue a college preparatory course. Such practices raise questions as to the fairness of the school officials involved, and where the racial disparity is marked, could possibly give rise to liability under the federal constitution.

The constitutional issue turns on whether the requirements or other screening devices were intended to have a racial impact or not. The discussion in Footnote 29 (*Footnotes*, June 1980) is relevant here. Briefly, the Supreme Court has indicated in a number of cases that the fourteenth amendment requires an intentional act of discrimination, but has also indicated that the fact that racial imbalance was a reasonably foreseeable result of certain actions is evidence that illegal intent was present.

Generally, the Court appears to take the view that some statistical disparity together with other questionable practices may operate to shift the burden of proof to school officials. Footnote 29 also notes that a number of lower courts have in fact shifted the burden to the defendant school after finding a racially disparate impact in a program.

Finally, it is useful to note the analogy to "tracking," or assignment to a special school. The constitutional implications of disproportionate racial impact as a result of involuntary assignment to EMR (educable mentally retarded) classes was discussed in the last issue in footnote 33 (*Footnotes*, June 1980).

On the whole a prudent school district would take precautionary measures to assure that its special programs, if available only to a selected group of students, are made available to children of different racial and ethnic backgrounds on an equal basis. This does not mean that the district must use racial quotas, but it should diligently search out and eliminate all the subtle and not-so-subtle barriers that may prevent minorities from full participation in the program. —PML

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There is a temptation for public schools to charge extra fees to help subsidize or even to fully fund some programs. Special courses not normally offered, courses requiring special equipment, and summer school are examples.

Most state constitutions contain some guarantee of free public education, and state courts have been fairly consistent in holding that fees for essential courses violate such provisions. Fees for "extras" may be a different matter, however. Finally, fees for texts or materials may trigger other language in state laws and constitutions. As the wording of different state constitutions varies considerably, and state courts may take different analytical approaches, the legitimacy of such practices will vary from state to state.

Many states have constitutional provisions guaranteeing "free common schools" (e.g., Idaho) or "free public and elementary schools" (e.g., Michigan). Courts in some of these states have determined that those things that are essential to education must be free. Thus, an Idaho court found a \$25 fee for books and extracurricular activities to violate the state constitution. The court reasoned that books

were a necessary part of schooling, and the extra-curricular fee was charged regardless of whether a student wished to participate in extracurricular activities and represented a charge on attendance generally, *Paulson v. Minidoka County School Dist.*, No. 331, 93 Idaho 469, 473 P.2d 935 (1970). The Michigan court invalidated a charge for texts and supplies and required the school district to refund some \$140,000 to students, *Bond v. Public Schools of Ann Arbor School Dist.*, 383 Mich. 693, 178 N.W.2d 484 (1970).

In recent attempts to charge fees, districts have attempted to restrict the charges to that which is not an essential part of the curriculum, or in other ways to remain within the strictures of a particular state law. For example, fees for summer school was an issue in *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979). Interpreting Georgia's laws and constitution, the state high court determined that, as summer school was not part of the 180 days of free school mandated by state law, school districts in the state could charge a tuition if they wished. See also *Granger v. Cascade County School Dist.*, 159 Mont. 516, 499 P.2d 780 (1972).

During the school year the analysis may be quite different. A New York court, upon considering the fee schedule of the Sodus Central Public School System, held that, among other things, extra fees could not be legally charged for art, home economics, music, science and industrial arts. The court was careful to point out that the district had established a fee schedule unrelated to the use of supplies in these courses, suggesting that under New York laws and constitutional provisions, it would be permissible to charge fees for materials and supplies, *Sodus Central School v. Rhine*, 63 A.D.2d 820, 406 N.Y.S.2d 175 (N.Y. App. 1978). As a final example the Supreme Court of New Mexico delivered a mixed ruling in a similar case, invalidating fees for certain materials but allowing a fee for the driver's education course, *Norton v. Board of Education of School District No. 16*, 89 N.M. 470, 553 P.2d 1277 (1976). To sum it up, the issue turns on the particular provisions in state law or constitutional provision. —PML

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Denial of choice may also require attention to the *due process* clause of the Fourteenth Amendment to the U.S. Constitution and its state constitutional counterparts. The fourteenth amendment

stipulates the broadest kind of requirement: "... nor shall any state deprive any person of life, liberty, or property, without due process of law..." As this proscription leaves undefined the terms "liberty," "property," and "due process," the courts have, of necessity, developed some rules for identifying these concepts, both in the school setting and elsewhere.

Supreme Court decisions relating directly to due process in education make it clear that the concept of "property" includes the statutory right to attend school, so that even a short-term suspension of that right will trigger a due process requirement of some sort. See *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (10-day suspension held to be denial of a property interest). The question at hand, however, is whether exclusion from an opportunity to pursue a special program, enroll in an alternative school, or otherwise pursue a choice generally made available to students would trigger due process requirements.

Lower courts have found removal from some special program or activity to be a denial of a property interest, particularly where the student could establish a link between the program or activity and future career possibilities. For example, suspension from an athletic program (*Kelly v. Metropolitan County Bd. of Educ.*, 293 F. Supp. 485 [M.D. 1968]) or athletic practice (*Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F. Supp. 602 [D. Minn. 1972]) have been held to trigger due process. The courts in these cases found that the suspended students had a relatively concrete, financial interest in pursuing the program, as it provided them with access to opportunities for scholarships upon graduation. The opportunity to pursue special academic offerings — art, science or otherwise — would be as critical to the student hoping to take that field after graduation. The opportunity to pursue vocational training courses could present a still more direct financial opportunity to the child. A child with special education needs, such as a need for bilingual training, could have an even stronger argument that exclusion from a special class was tantamount to exclusion from school.

In sum, once choice is made available, consideration must be given to constitutional procedural requirements if it is to be withdrawn. Whether due process is required will depend on the court's assessment of the lost opportunity, and whether it represents a "liberty" or "property" interest to the student.

It should be noted that students do not always have a property interest in access or retention in any program, even if those in the program

can reasonably expect some ultimate financial gain. A hearing is not likely to help in the decision to deny the opportunity to choose an alternative school because the budget was exhausted, or because a student exceeded the preestablished age limit for a program. Also, some factual determinations rest upon the subjective judgment of experts and are not easily reviewed in a formal hearing. Thus, the Supreme Court has upheld the dismissal without hearing of a student from medical school for "poor bedside manner" and other reasons relating to her performance as a student, reasoning that the academic judgments made were peculiarly within the expertise of the school officials, *Board of Curators v. Horowitz*, 435 U.S. 78 (1978).

Finally it should be noted that the courts will assess the seriousness of the liberty or property deprivation and require proportionately more elaborate procedures for more serious losses. See generally *Goss v. Lopez*, 419 U.S. 565 (1975). —PML

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Aid to private schools expands the range of family choice by making private schools more affordable. Since a substantial proportion of private school children attend parochial schools — more than half in most states — any program for aid to private schools will usually invoke a constitutional challenge under the first amendment. The federal constitution assures both the "free exercise" of religion and prohibits government "establishment" of religion. The Supreme Court has interpreted these clauses so as to require neutrality, a primary secular purpose in the aid program, and freedom from excessive entanglement between church and state.

A review of selected recent Supreme Court cases helps to identify the boundaries of these criteria. In 1973 in *Committee for Public Education v. Nyquist*, 413 U.S. 756, the Supreme Court invalidated a complex program established in New York to provide grants and tax relief to parents as well as direct aid to private schools in the state. The program included a cash grant — the lesser of 50 percent of tuition or \$50 or \$100 cash, depending on the grade attended — to low-income families for every child attending private school. The program also provided for direct aid to schools through grants for maintenance and repair, tuition reimbursement in certain cases, and similar aid. The

Court appeared to focus on the complexity of the scheme and the failure to assure that the aid would be used for secular purposes only.

Another New York aid program reviewed in the same term provided for reimbursement to church-sponsored and secular private schools the costs of administering various state-required testing and reporting duties. This early version of the law was found invalid, *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973) (Levitt I). The Supreme Court voided the program for failure to assure that aspects of the subsidized activity (the teacher-administered tests) were free of religious content. As will be discussed, the next revision of New York's aid program for testing was found constitutional.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court struck down two Pennsylvania statutes that provided auxiliary service, instructional materials, and equipment, as well as text books to private schools. The auxiliary services included the loan of a public school teacher to work with special education students at the private schools. The services were made available at the request of the private school. A fragmented court found all of the program (except textbook loans to the students themselves) to be unconstitutional. Six justices, subscribed to Stewart's view that the secular and the religious education were so "inextricably intertwined" in private schools (which were described as "religion-pervasive" institutions) that "[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid for the sectarian school enterprise as a whole." Things looked pretty dim for private school aid after *Meek*.

Two years later, however, the Court decided *Wolman v. Walter*, 433 U.S. 229 (1977), involving Ohio's million dollar program providing direct aid to private schools to assist in the purchase of textbooks, instructional materials, equipment, and in the administration of standardized tests and scoring, diagnostic services, and therapeutic services to children at a religiously neutral site, and costs of transportation for field trips. Ninety-six percent of the nonpublic school children were in parochial schools. The Court upheld the program except for that part which provided support for the purchase of instructional materials and equipment, such as tape recorders, which could be used for religious instruction, and the field trip services. The distinction rested on the supervisory ability of the state. It was a relatively simple matter (with no excessive

entanglement) to approve texts and materials, tests and diagnostic services, assuring that they were free of religious content.

Following *Wolman v. Walter*, the Court again reviewed New York's support of testing activities. The state legislature had made a number of modifications in the law, as suggested by *Levitt I*, and the second time this law came before the Court it had remanded the case to the lower courts (which had continued to rule the aid program unconstitutional) for reconsideration in light of *Wolman*. *Levitt v. Committee for Public Education*, 433 U.S. 902 (1979) (Levitt II). The law came before the Court a third time in *Committee for Public Education v. Regan*, 100 S.Ct. 840 (1980). In *Regan* the Court upheld the aid program, indicating that the *Meek* decision should be read narrowly. The Court observed that a broad reading of *Meek* would require invalidation of any aid program.

These cases suggest that there are forms of aid programs — including those providing substantial support to private schools — that will pass constitutional muster. They must be carefully designed, however. Further, it must be expected that some Supreme Court decisions will be decided adversely. The situation is one where some state legislatures are consciously testing the limits of the law in order to maximize the amount of aid the state can provide.

The Court's decisions suggest that an aid program should be easy to supervise (to avoid church/state entanglement) and should contain adequate safeguards to assure that the program will not support religious activity. It is quite clear that provision of secular texts and materials to students is permissible. It would also appear that provision of textbooks and similar materials to schools — after approval by state officials (who can check the materials for religious content) would be permissible. Materials that could change in content (such as blank tapes or film) are less likely to be permissible, because of the difficulty in monitoring their use to assure that the subsequent use by the school is purely secular. On the other hand general grants to parochial schools are clearly unconstitutional. In between the extremes are a range of possibilities that must await future court testing.

For example, a number of legal scholars have argued that a loan of a public school teacher — although ruled unconstitutional in *Meek* — might be upheld where the record contained evidence adequate to assure the Court that the teacher's secular

work was not affected by the sectarian setting. Others have argued that some plan for tax credits or tuition vouchers would be valid, so long as the plan is kept simple, arguing that the family makes the choice of schools from among state accredited schools, thereby avoiding any additional entanglement between church and state. See *e.g.*, Note, "Government Neutrality and Separation of Church and State: Tuition Tax Credits," 92 *Harvard Law Review* 696 (1979). These advocates also argue that the government is not supporting any particular religious belief or nonbelief, as it leaves the choice of schools — secular or sectarian — entirely to parents. Others argue that any form of aid to religious schools is problematic, and entanglement between church and state is unavoidable. See *e.g.*, Hunter, "The Continuing Debate Over Tuition Tax Credits," 7 *Hastings Const. L.Q.* 523 (1980). These ideas will undoubtedly be tested in time because a number of state and federal programs are being developed based on such suggestions. —PML

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Recommendations. A district seeking to implement a new program making choice available in one way or another (within or among its schools) is advised to review the plan with its attorney if the plan is likely to have an effect of

- creating racially imbalanced schools or classrooms
- excluding minority children from a particular course, program or other educational opportunity
- excluding a disproportionate number of male or female students, low-income students, handicapped students, or other identifiable group of students
- imposing injury on any individual student.

Having a disproportionate effect, as discussed in Footnotes 29 and 38 is not necessarily fatal to the plan, but it can present legal difficulties under the equal protection clause of the fourteenth amendment or under any one of a number of state or federal civil rights statutes.

Larger-scaled plans to enhance or restrict family choice — implementation of a state aid program for private schools or increased regulation of private schools — should always be reviewed by legal counsel. Such programs must be carefully designed to assure they do not violate the constitutional standards established under the first amendment.

Any plan that operates to impose an injury — defined broadly to include the withdrawal of an opportunity — on an individual student must consider the right of the student to procedural due process before the decision is made.

These are the major types of legal and constitutional issues likely to arise when families are permitted educational choices. Other legal problems are also possible, but of minor significance. For example, a local district may seek to implement a plan that is beyond its statutory powers. The solution in such cases is to obtain enabling legislation from the state legislature.

All in all a wide variety of programs for family choice are possible, given the constitutional safeguards and legal restraints. Consideration of the constitutional and legal requirements must be made, and they will sometimes require modification of the program, but rarely will it be necessary to abandon an effort altogether. —PML

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LEC has a limited supply of reprints of "An Equal Choice Plan for Eliminating School Segregation," *Texas Law Review*, Vol. 56, No. 7, August 1978, an article by LEC Staff Attorney Patricia M. Lines. This article discusses in detail the legal considerations to be made if a school district seeks to completely dismantle a neighborhood or other assignment policy and assign children to schools according to family choice. Copies are available from the Law and Education Center at ECS, 1860 Lincoln St., Denver, CO 80295 for \$2.50 each, prepaid.

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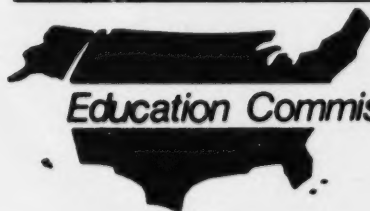
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